No. 09-215

SUPREME COURT

OF

THE UNITED STATES OF AMERICA

TULANIA SIRENS FOOTBALL TEAM,

Petitioner,

v.

BEN WYATT; THE CENTER FOR PEOPLE AGAINST SEXUALIZATION OF WOMEN'S BODIES**;**

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM 6

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II. The Fourteenth Circuit incorrectly concluded that the Tulania Sirens were negligent in the matter. Under a traditional negligence framework, the Respondent is not an employee of the Tulania Sirens and, thus, is owed no duty by Petitioner; the Petitioner breached no duty to the Respondent, and actually warned others - including the Respondent - of potential danger by placing an orange cone on the affected area, and the Respondent's injury was not proximately caused by the Sirens' alleged failure to fix a small patch in the turf.

STATEMENT OF FACTS

On Thanksgiving Day, Ben Wyatt ("Wyatt"), the star wide receiver for the New Orleans Green Wave, entered Yulman Stadium to face the opposing team and division rival the Sirens. R.12. As Wyatt nervously ran onto the field, he was startled by a giant mermaid drawing in middle of the field. R. 12. In addition, depictions of the Sirens' new mascot were distributed inside and outside the stadium. R.12. The images of the mascot upset Wyatt's wife Leslie Knope; Leslie and the couple's young children were present at the game where they were exposed to the topless mascot — both on the field and through the decorations and pamphlets that were distributed to the crowd. R. 12. Most notably, Wyatt and others were exposed to the image of the mascot prior to the Thanksgiving Day game. R. 12. The Sirens mailed pamphlets to the citizens of Tulania showcasing the new mascot and promoting Thanksgiving Day game providing the location and time of the event. R. 12. Wyatt and his family received the fliers that read in bold print, "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS' GEAR IN STORES AND ONLINE TODAY!" R. 12.

The Center for People Against Sexualization of Women's Bodies ("PASWB"), of which Leslie Knope is a member, was particularly offended by the new mascot. R. 12. The PASWB stated that the new mascot "appeals to the prurient interest and is not how the city of Tulania would like to be portrayed." R. 12. Following the rebranding of the mascot, the city of Tulania passed a law stating,

> [E]very person who knowingly: sends or causes to be sent,or brings or causes to be brought into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his/her possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

Section 12 Tulania Penal Code (2019) ("Section 12") R 12.

Soon after Wyatt's entrance into Yulman Stadium in Tulania, Wyatt began warming up for the game. R. 17. During pregame warmups, a player on the Tulania Sirens dove for a catch, and as he hit the ground, his face mask dug into the turf. R. 17. A large portion of the turf was jammed into the face mask, leaving behind a partially exposed patch of cement about 10 feet behind the left side of the endzone. R. 17. A member of the Tulania staff placed an orange cone over the affected area. R. 17. During the fourth quarter, Wyatt was out of control after sprinting full speed to make a great catch in the back of the endzone. R. 17. His foot landed on the cement patch that was not covered by the cone, causing him to slip and fall; thus, injuring his left knee. R. 17.

ARGUMENT

I. The Tulania Siren mermaid mascot is a protected material under the First Amendment.

The Fourteenth Circuit's decision finding that Tulania's mascot depicted to be a mermaid with exposed breasts violated Section 12 of the Tulania Penal Code should be reversed because the mascot is not obscene and is protected by Tulania's First Amendment rights. It is well established that the First Amendment protects speech. *Miller v. California*, 413 U.S. 15, 23 (1973). However, the First Amendment does not protect the dissemination of obscene material, and states have a legitimate interest in preventing the dissemination of such material. *Id.* It is important that "the standards for judging obscenity safeguard the protection of freedom of speech and press" because this right has been vital in the evolution of our free society. *Roth v. U.S.*, 354 U.S. 476, 488 (1954). Section 12 attempts to protect Tulania's legitimate interest against dissemination of obscene material, providing: "every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes or offers to distribute or has in his/her possession with intent to distribute or to exhibit or offer to distribute any obscene matter is guilty of a misdemeanor." Sec. 12 Tulania Penal Code (2019). R 12.

A jury's role in making determinations of obscenity can be overruled by a reviewing court's independent evaluation of the alleged obscene material. *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974). Not all sexually oriented material is obscene, and any material that is not considered obscene retains First Amendment protection. *Roth*, 354 U.S. at 484. A state's obscenity statute is applied in concurrence with "basic guidelines" established in *Miller* that the trier of fact uses to determine whether material is considered obscene. *Miller*, 413 U.S. at 24.

In the present case, Tulania's mascot is not obscene because (1) Section 12 fails to define the "obscene material" that it seeks to prohibit, making the statute unconstitutionally vague and overbroad. (2) Even if the statute is not impermissibly vague and overbroad, the mascot is not obscene because it passes the applicable test under *Miller.*

A. Section 12 of the Tulania Penal Code is overbroad because it does not define what constitutes "obscene materials."

Section 12 of the Tulania Penal Code is unconstitutional because its overbreadth and vagueness impermissibly restricts constitutionally protected speech. A statute is unconstitutional if provisions of the statute are so vague and overbroad that they prevent a large number of people from practicing their First Amendment rights. *Reno v. ACLU,* 521 U.S. 844, 874 (1997). A statute is less likely to be considered vague if the statue "specifically defines" material that is patently offensive. *Id.* at 846. If an obscenity statute fails to specifically define the patently offensive material it seeks to prohibit, then the statute should be deemed unconstitutional. *Id.* If a statute poses a danger of prohibiting constitutionally protected conduct that is common among individuals not before the court, then the statute is "substantially overbroad." *City of Houston, Texas v. Hill,* 482 U.S. 451, 458 (1987).

An ordinance meets constitutional muster when it provides a clear definition of the speech it seeks to prohibit. *See City Council v. Taxpayers for* Vincent, 466 U.S. 789 (1984). In *City Council v. Taxpayers for Vincent,* a Los Angeles city ordinance restricted the posting of signs on public property. *Id. at* 790. The plaintiffs posted multiple signs around the city and thereafter sued the city because city employees removed the signs. *Id.* at 802. The plaintiff sued on the grounds that the sign removal violated their First Amendment right to freedom of speech. *Id.* The court noted that the city ordinance prohibiting the posting of signs was narrowly defined to further the state's

interest in maintaining aesthetics in public areas. *Id.* at 805. The plaintiff in *City Council* violated a well-defined ordinance that sought to further an important state interest; therefore, the statute was held to be constitutional. *Id.* at 817.

In *Reno v. American Civil Liberties Union*, the constitutionality of the Communications Decency Act (CDA) was challenged on the grounds that the CDA violated the First Amendment's protection of free speech. *Reno*, 521 U.S. at 845. The CDA provisions prohibited the transmission of "patently offensive messages" in a manner that is available to any minor. *Id.* at 859. This Court noted that the CDA was overly broad and vague because it did not provide specific definitions of content that would be deemed to be "patently offensive." *Id.* at 879. As such, this Court held that CDA was unconstitutional because it was so broad and vague that it risked prohibiting a large amount of speech that adults have a constitutional right to share with one another. *Id.* at 883.

This Court has also held that a law may be deemed substantially overbroad where it frequently prohibits protected speech. In *City of Houston v. Hill*, the defendant was arrested and charged with violating a city ordinance that prohibited any conduct that would disturb a police officer in the execution of his duties. *City of Houston*, 482 U.S. at 452. This Court held that the ordinance was substantially overbroad because it "[criminalized] a substantial amount of constitutionally protected speech," and was susceptible of regular application to protected expression. *Id.* at 466-67, 472.

Here, Section 12 is impermissibly overbroad and vague because it fails to define the prohibited expression and fails to provide adequate notice to Tulania citizens of what speech is permitted. For Section 12 to be constitutional, its language and effect should reflect the city ordinance at issue in *City Council.* By contrast, Section 12 does not identify the "obscene matter"

that is seeks to prohibit. R. 8. Furthermore, Section 12 does not provide a sufficient warning as to the conduct that will be prohibited by the statute. R. 8.

Like the statute in *Reno* that failed to specifically define the "patently offensive" content that it sought to prohibit, Section 12 likewise does not define the obscene material that is seeks to prohibit. R. 7. The statute explains and describes the modes in which "obscene matter" is unlawfully distributed by stating that an "obscene matter" cannot be "[sent], brought, [sold], published, printed, or possessed with intent to exhibit or distribute." *Id.* However, it is entirely silent on how "obscene matter" is defined.

Moreover, the extent of Section 12's breadth effectuates a chilling effect on the rights of Tulania citizens because they will have difficulty in ascertaining whether a future display of the human body will be deemed obscene. R. 8. Like the ordinance in *City of Houston* that posed a danger of repeatedly restricting constitutionally protected speech, the overbroad and vague effect of Section 12 will likely limit an overwhelming amount of protected expression under the First Amendment. It is important to note that displaying the human body in its natural form happens more often than challenging police authority. Thus, should this Court find that Section 12 is constitutional, the substantially overbroad effect of the statute not only prohibits Tulania University from displaying its mascot but also prohibits other natural displays of the human body, like sculptures of nude women. R. 8. In light of the facts that modern society has a growing respect for the human body and free expression is vital to a democratic society, freedom of expression should be safeguarded and not taken for granted. R. 15; *Roth*, 354 U.S. at 488.

In conclusion, the Tulania statute is unconstitutionally overbroad because it "risks prohibiting a large amount of speech" that is constitutionally protected. *Reno*, 521 U.S. at 844. Section 12 is unconstitutional because it does not specifically define the obscene matter that it

seeks to prohibit. Further, the statute is vague because the failure to define the "obscene matter" in the statue will result in the restriction of constitutionally protected expression of other Tulania citizens. Therefore, the vagueness of this statute makes its enforcement unconstitutionally overbroad.

B. Tulania's mascot is not obscene according to a thorough application of the Miller test.

Even if this Court does find that Section 12 is constitutional, the Fourteenth Circuit nevertheless erred in finding that the mascot depicted as a partially nude mermaid is obscene. In order to discern whether a particular type of material is obscene, this Court has established the following basic guidelines in *Miller v. California*:

> (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work taken as a whole, lacks serious literary, artistic, political or social value.

Miller, 413 U.S. at 24. Pursuant to *Miller*, Tulania mascot is not obscene for the following reasons: (1) an average person applying Tulania's contemporary community standards would find that the mascot, taken as a whole, does not appeal to a prurient interest, (2) the mascot does not depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the mascot, taken as a whole has serious artistic and political value.

1. The mermaid's breasts are not exposed in a way that appeals to prurient interests.

Tulania's mascot does not appeal to prurient interests in light of Tulania's community standards. Contemporary community standards are for a jury from the forum community to define. *Miller*, 413 U.S. at 33. The jurors apply the contemporary community standards of the relevant

community to confirm that the allegedly obscene material is "judged by its impact on an average person, rather than a particularly susceptible or sensitive person - or indeed a totally insensitive one." *Id.* In determining an appropriate standard, jurors may adopt the community standard of their home town or current residence. *Hamling v. U.S*, 418 U.S. 87, 104 (1974). A common opinion among a group or variety of groups cannot represent the community standards of a particular area because these groups do not represent the entire community. *Hoover v. Byrd*, 801 F.2d 740, 741 (5th Cir. 1986).

The "variable obscenity standard" is used determine whether material is considered to be obscene to children. *Ginsberg v. New York*, 390 U.S. 629, 673 (1968). This standard clearly provides that "all nudity cannot be deemed obscene, even as to minors." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975). Moreover, "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow well-defined circumstances may government bar public dissemination of protected materials to them." *Id.* at 213. A prurient interest "may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex." *Roth*, 354 U.S. at 496. Materials that stimulate normal or healthy sexual desires do not appeal to prurient interests. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 494 (1985).

In *Jenkins v. Georgia*, the defendant was convicted for distributing obscene material because he screened a film "Carnal Knowledge", which included some nudity and sexual innuendos but never explicitly displayed sexual activity. *Id.* This Court held that nudity alone did not amount to patently offensive material, and as a result, the film was not obscene. *Id.* This case is analogous to *Jenkins*; like the film in *Jenkins* that displayed only nudity and not sexual activity, the Tulania mascot only displays some nudity. R. 15. The Supreme Court said that nudity alone

does not amount to patently offensive material; thus, the sole display of a woman's breast cannot amount to obscene material. *Id.* The mascot depicting a topless mermaid only displays the mascot's breast. *Id.* Thus, Tulania's display of a topless mermaid merely amounts to partial display of nudity. *Id.* Therefore, the mere display of a team mascot reflecting partial nudity does not appeal to a prurient interest and the Tulania mascot is not obscene. *Id.*

In *State v. Smith*, the defendant was arrested for showing an adult film in a New Orleans movie theater that displayed men and women engaging in sexual acts. *State v. Smith*, 543 So.2d 555, 557 (4th Cir. 1989). The defendant sought to admit the testimony of a sociologist who concluded based on subsequent research that similar pornographic films would be acceptable under the more liberal New Orleans community standards. *Id.* at 558. The Fourth Circuit noted that the exclusion of the sociologist's testimony was harmless error and affirmed the obscenity conviction. *Id.* at 558, 560.

Unlike the movie in *Smith* displaying men and women engaging in various sexual acts, the mascot did not perform any sexual acts and merely displayed natural body parts. R. 8. Although the expert testimony was not admitted, it could have educated the jury on the contemporary community standards within New Orleans and perhaps alter the jury's verdict. Furthermore, the severity of the sexual activity displayed in the movie is objectively more offensive than the mere display of natural body parts. Considering the expert's testimony on the contemporary community standard within New Orleans at the time and how progressive the city has become since, it is reasonable to conclude that Tulania's mascot would be deemed acceptable under the community standards of New Orleans.

In *Erznoznik v. City of Jacksonville*, the defendant was charged with violating a city ordinance for displaying a film containing nudity at a drive-in movie theatre. *Erznoznik*, 422 U.S.

at 205. The state attempted to bolster the ordinance as an exercise of "undoubted police power to protect children." *Id.* at 212. The court noted that the ordinance "sweepingly" restricts the display of "buttocks [and] breasts" in all films. *Id.* at 213. The court then provided multiple examples in which nudity may be appropriate for children to view, these examples included "a film containing a picture of a baby's buttocks, the nude body of a war victim, scenes from a culture in which nudity is indigenous, … newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." *Id.* The court held that the ordinance attempting to regulate expression as to minors was overbroad. *Id.* at 217.

This case is analogous to *Erznoznik*; like the city ordinance in *Erznoznik* that erroneously prohibited minors from being exposed to all films containing nudity, the appellate court's application of Tulania's statute will prohibit minors from being exposed to nudity when it is a constitutionally protected form of expression. R. 16. The Supreme Court alluded to multiple examples of nudity that would be appropriate for a minor to see. One of the examples was "the nude body of a war victim." *Erznoznik,* 422 U.S. at 213. If the Supreme Court condones a minor being exposed to "the nude body of a war victim" then it is reasonable to conclude that a minor should be able to see the breasts of a woman.

Overall, Tulania's mascot does not appeal to prurient interests in light of Tulania's community standards. The application of New Orleans' community standards would result in a verdict holding that Tulania's topless mascot is not a prurient interest.

2. The Southern District of Tulania properly found that the Tulania Obscenity Statute does not adequately define the banned material therefore the second Miller prong does not apply.

The second prong of the Miller test for obscenity requires the Court consider whether the material in question depicts or describes, in a patently offensive way, sexual conduct or excretory

functions, specifically defined by applicable state law. *Miller v. California*, 413 U.S. 15 (1972). Here the applicable state statute, Tulania Sec. 12 (2019), does not define what would constitute patently offensive material, therefore, the second prong of the Miller Test does not apply under the circumstances and cannot be met.

The Fourteenth Circuit erred in its reading of the Tulania statute as defining the material banned under its language. R. 7. While the Court correctly found that the statute outlines the manner in which the banned material could be distributed, the Court's focus on the Tulania Sirens' distribution was a misapplication of the Miller test as the Court did not focus on what was banned but rather how any material was kept and distributed. There is no dispute whether the action of the Tulania Sirens would constitute distribution. The dispute lies with whether that material which was distributed amounted to patently offensive material under the specific statute. Since the statute only describes the manner of distribution, and gives no guidance as to what constitutes offensive material but the material which was distributed. *Id*.

3. The mermaid does not lack serious artistic and political value because she is rationally related to the team name and other team mascots.

Tulania's mascot, taken as a whole, does not lack serious artistic and political value because it is not obscene. Context can redeem otherwise obscene material when there is contextual relativity between the offending portion of the work, or immediate context, and the rest of the work, or broader context. *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). The circumstances surrounding the contested material should be considered to decide whether the material appeals to a prurient interest. *Id.* Therefore, the material being reviewed should be compared to other similar materials. *Id.* The offensive portion of the work is considered the immediate context of the work and the entire work is considered the broader context. *City of St. George v. Turner*, 813 P.2d 1188, 1193 (Utah Ct. App. 1991).

The immediate context includes other works that are used in a similar form to express an idea or a certain representation. *Id.* The broader context includes the forum or culture in which the contested material is displayed. *Id.* A common opinion among a group or variety of groups cannot represent the community standards of a particular area because these groups do not represent the entire community. *Hoover*, 801 F.2d at 741. Additionally, the court will apply a reasonable person standard rather than a contemporary community standard to determine whether the material has serious literary, artistic, political, or scientific value. *State v. Walden Book Co.*, 386 So.2d 342, 345 (La. 1980).

In *City of St. George v. Turner*, the defendant was charged with violating a city obscenity ordinance because in a collage of paintings there were two paintings that depicted a woman in a "spread eagled manner so as to expose her pubic area" and "an enlarged drawing of a woman's pubic area." *City of St. George*, 813 P.2d at 931. The court noted that although the two drawings displayed nudity, they satisfied the *Kois* test because "they rationally relate to the immediate context (i.e., the wall hangings) and to the broader context (i.e., the record store)." *Id.* at 935. The court reasoned the entire collage of paintings must be considered patently offensive to convict the defendant for displaying the works. *Id.* The court reversed the conviction and held that the entire collage of paintings was not patently offensive. *Id.*

Like the paintings in *City of St. George* that were not considered patently offensive, the Tulania mascot is not patently offensive because its rational relation in context - taken as a whole - does not appeal to a prurient interest. R. 6. The Tulania mascot is rationally related to the immediate context (i.e., other mascots within the league) and to the broader context (i.e., the football game). R. 12. Similar to the "entire collage" that was not considered "patently offensive" in *City of St. George*, there are no other mascots alleged to be obscene in the record just as there were no other paintings alleged to be obscene in *City of St. George*. Therefore, the consideration of all the paintings in the collage did not result in an obscenity conviction because the other non-obscene paintings diluted any potential violation posed by the allegedly obscene paintings.

Here, the alleged obscenity violation posed by Tulania's mascot (immediate context) is completely diluted by the atmosphere of a rivalry football game taking a place on Thanksgiving Day (broader context). *City of St. George*, 813 P.2d at 931. The atmosphere of the rivalry football game included the attendance a large portion of the community, Wyatt's performance as a star wide receiver, and the intense atmosphere inherent in a rivalry game. R. 12. It is reasonable to conclude that these factors, composing the broader context, offset any offensive reaction that may have been felt by the entire community. R. 12. The complaints asserted by groups in the community cannot represent the view of the entire community because these opinions are not shared among the whole community. *Hoover*, 801 F.2d at 741.

Additionally, the opposing team's mascot the Green Wave also offset the sole attention drawn to Tulania's mascot. R. 12. Without any indication in the record otherwise, Tulania's mascot is the only mascot that has been alleged to be obscene. Thus, it is not possible that the other mascots - taken as a whole - appeal to a prurient interest. It is unlikely that the entire community was offended by Tulania's mascot because any offense was diluted by when the other mascots at the game and the atmosphere inherent in a rivalry football game. R. 12. Mermaids are fictional creatures not found in nature, and therefore, any rendering of a mermaid necessarily involves subjective input or interpretation of the artist. The exposed breast part of the female anatomy and may be incorporated into the total depiction of a mermaid, just as the paintings in St. George which were part of a larger whole. Therefore, Tulania's mascot, taken as a whole, does not lack serious artistic and political value because it is not obscene.

Tulania's mascot does not appeal to a prurient interest because the mascot is appropriate under the New Orleans community standards and does not appeal to a prurient interest. Additionally, the mascot is not patently offensive according to Section 12. The artistic value of the mascot, taken as a whole, renders the mascot as not obscene and therefore protected by the First Amendment.

II. This Court should reverse the Fourteenth Circuit's decision because Tulania was not negligent in the Petitioner's injury.

The Fourteenth Circuit's decision that Ben Wyatt's injury was a result of Tulania's negligence should be reversed because the Tulania Sirens did not have a duty to warn Ben Wyatt, did not breach any duty owed to Ben Wyatt, and were not the proximate cause of his injury. In a traditional negligence claim, the plaintiff must prove that the defendant "had a duty to protect the plaintiff from injury, the defendant failed to perform that duty, and the defendant's failure proximately caused injury to the plaintiff." *Green v. Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014). In the present case, the Tulania Sirens: (1) did not have a

duty to warn Ben Wyatt, (2) did not breach a duty owed to Ben Wyatt, and (3) were not the proximate cause of Wyatt's knee injury.

A. The Sirens do not owe a duty to the Petitioner because he is an invitee and not an employee.

The Tulania Sirens did not owe a duty to warn Ben Wyatt. Whether there is an existence of a duty is a question of law for the court to decide. *Carman v. Wieland*, 406 S.W.3d 70, 76 (E.D. Mo. 2013). To determine whether a duty is owed, the court considers "whether a reasonably prudent person would have anticipated danger and provided against it." *Green*, 21 F.Supp.3d at 1027. A duty arises from situations where there is a "foreseeable likelihood that particular acts or omissions will cause harm or injury." *Smith v. Dewitt and Associates*, Inc., 279 S.W.3d 220, 224 (S.D. Mo. 2009).

Wyatt is an invitee of the team of Tulania. Thus, he is not an employee of the team of Tulania. There are multiple duties that arise from an employer-employee relationship**.** *Green***,** 21 F.Supp.3d at 1027. Some of these common law duties include the "maintenance of a safe work environment, not to expose employees to unreasonable risks, and to warn employees about the existence of dangers of which they could not reasonably be expected to be aware." *Id.* However, if a defendant is not the plaintiff's employer, then the defendant is not liable for the performance of an "employer's non-delegable duties." *Carman*, 406 S.W.3d at 76. An employer-employee relationship exists only if the alleged employer "controls the manner and means of the employee's service." *Id.* The factors used to determine whether there is requisite control inherent in a employer-employee relationship exist, include: "the extent of control, the actual exercise of control, the duration of the employment, the right to discharge, the method of payment, the degree to which the alleged employer furnished equipment, the extent to which the work is the regular business of the alleged employer, and the employment contract." *Id.*

An invitee is "one who enters the land or premises of another with the express or implied consent of the possessor and for the benefit or interest to the possessor or for the mutual benefit of both the invitee and the possessor. *Lacy v. Wright*, 199 S.W.3d 780, 783 (E.D Mo. 2006). The possessor of land owes a duty of reasonable care to make the premise safe for the invitee, including warning the invitee of dangerous conditions he is unlikely to discover. *Id.* However, "an open and obvious danger" negates the duty to warn unless the possessor should anticipate the invitee would be harmed despite the invitee's constructive knowledge. *Id.*

In *Leslie v. School Services and Leasing, Inc*., the plaintiff was injured during a job training and filed suit against her employer for payment to fund her medical treatment. However, the defendant alleged that an employer-employee relationship never existed, so they did not owe payment to the plaintiff. *Leslie v. School Services and Leasing, Inc*., 947 S.W.2d 97, 98 (W.D. Mo. 1997). To assess the existence of an employer-employee relationship, the court looked to whether the defendant controlled the manner and means of the plaintiff's services. *Id.* Because the defendant neither exercised control over the plaintiff's performance nor have the right to control the plaintiff, the court concluded no such employment relationship existed. *Id.* at 101.

This case is analogous to *Leslie*; like the defendant in *Leslie* that did not exercise or have any control over the plaintiff's performance, and did not have an employment contract with the plaintiff, Tulania's team did not exercise or have any control over Ben Wyatt, and did not have an employment contract with Ben Wyatt because he was not on their team. Therefore, an employer-employee relationship did not exist between Ben Wyatt and Tulania's football team. The district court opinion states that Ben Wyatt based his claim on the common law duties owed to invitees and employees. R. 17, 18. However, this is inconsistent because the duties owned to invitees and employees are not the same. The appellate and district court's opinions are erroneous because the

reasoning in these opinions characterizes Tulania's team as Ben Wyatt's employer. R. 9. In an employer-employee relationship, the employer owes an employee specific non-delegable duties. The appellate and district court held that Tulania was responsible for failing to performing these non-delegable duties. R. 18. However, Tulania was not Ben Wyatt's employer; thus, Tulania did not owe Ben Wyatt the performance of the specific duties owed by an employer. R. 18. Ben Wyatt was an invitee and Tulania, as the possessor of the stadium, owed a different standard of care to Ben Wyatt. R. 17.

In *Rapp v. Eagle Plumbing, Inc.*, the defendant dug a trench on a construction site and while the plaintiff was standing on the edge of the trench, the trench wall collapsed causing injury to the plaintiff. *Rapp v. Eagle Plumbing, Inc*., 440 S.W.3d 519, 521 (E.D. Mo. 2014). The plaintiff in this case was an invitee; therefore, the defendant argued that he did not owe a duty to warn the plaintiff of the "open and obvious" dangerous condition. *Id.* The plaintiff claimed that the defendant did owe a duty to warn or barricade the trench because plaintiff did not know that there was a risk that the trench wall would collapse. *Id.* The court held that the facts of this case did not satisfy the plaintiff's claim - asserting that the trench was a hidden danger - because the trench was an open and obvious danger. *Id.*

This case is analogous to *Rapp*; like the plaintiff in *Rapp* that erroneously asserted that the defendant had a duty to warn him of an "open and obvious danger", Ben Wyatt also erroneously asserted that Tulania had a duty to warn him of an "open and obvious" danger. More specifically, the plaintiff in *Rapp* asserted that the defendant failed to warn him of the danger posed by the trench wall. Similarly, Ben Wyatt asserted that Tulania owed a duty to warn him of a hazard that the appellate court described as a "sizeable ditch." R. 9. A "trench" and a "sizeable ditch" are analogous. The "trench" was considered to be an open and obvious danger in *Rapp*; thus, the

"sizeable ditch" in this case should also be characterized as an open and obvious danger. R. 9. Therefore, Tulania did not have a duty to warn him of the open and obvious danger.

B. A duty was not breached because Tulania warned the Petitioner about the exposed concrete.

Even if the ditch located behind the end zone was not an obvious danger, the Tulania Sirens did not breach their duty because they warned Ben Wyatt by placing a cone on the exposed concrete. The duty to keep property safe for invitees only applies to conditions that are hidden in nature. *Harbourn v. Katz Drug Co.*, 318 S.W.2d 226, 234 (Mo. 1958). In other words, the possessor is only liable for conditions that are not known and would not be seen by the invitee in the exercise of ordinary care. *Id.* It is well established under the law that not all attempts to warn will absolve a defendant of liability. *Rhoades v. Kandlbinder, Inc.*, 557 S.W.3d 502, 509 (E.D. Mo. 2018). However, a warning giving notice of a dangerous condition can relinquish a defendant from legal liability. *Paubel v. Hitz*, 96 S.W.2d 369, 371 (Mo. 1936). Additionally, a warning cone is not a dangerous condition if the cone is placed in plain sight and not in a heavily congested area. *Rycraw v. White Castle Systems, Inc.*, 28 S.W.3d 495, 500 (E.D. Mo. 2000).

In *Rycraw v. White Castle Systems, Inc.*, a warning cone was placed behind the plaintiff while the plaintiff was in line to purchase food. The plaintiff never saw the warning cone and tripped on the cone causing her to fall. *Id.* at 497. The defendant filed a motion for summary judgment and the plaintiff answered the motion by asserting that the warning cone was a dangerous condition. *Id.* The court noted that the plaintiff's testimony created an inference that the warning cone could have been a dangerous condition. *Id.* However, the court allowed the plaintiff's claim to survive the summary judgment motion, but the court did not hold that the warning cone was a dangerous condition. *Id.* at 500.

This case is distinguishable from *Rycraw*; unlike the defendant in *Rycraw* that placed the warning cone directly behind the plaintiff and out of her sight, the Tulania staff placed the warning cone 10 feet behind the end zone in an area plainly visible to Ben Wyatt. R. 17. The conditions in which the cone was placed in *Rycraw* are much worse than the conditions in which the Tulania staff placed the cone. Moreover, it is important to note that the warning cone in *Rycraw* was not considered to be a dangerous condition even though the cone was placed behind the defendant and out of her sight. R. 17. Therefore, since the court did not conclude that the warning cone was a dangerous condition in *Rycraw*, there is no reason why this court should conclude that the warning cone was a dangerous condition in this case. Additionally, the appellate court analogizing the cone to a useless sticky note is a terrible analogy because a cone universally known as a warning symbol. R. 9. In this case, the warning cone placed by Tulane functioned as warning. R. 9. Ben Wyatt made an attempt to avoid the area marked by the cone after making the catch in the back of the end zone. R. 9. The cone did not contribute to the cause of Ben Wyatt's injury. R. 9. Therefore, the cone sufficiently warned Ben Wyatt and Tulania did not breach any alleged duty owed to Ben Wyatt.

C. Tulania's conduct is not the proximate cause of the Petitioner's injury because the Petitioner assumed the risk of the sport.

Tulania's conduct was not the sole proximate cause of Ben Wyatt's injury. In order to prove a negligence claim, the plaintiff must prove that the defendant's conduct was the cause in fact and the proximate cause. *Robinson v. Missouri State Highway and Transp. Com'n*, 24 S.W.3d 67, 77 (W.D. Mo. 2000). A defendant's conduct is the cause in fact if the plaintiff's injuries would not have occurred but for that conduct. *Id.* However, "Proximate cause is not causation in fact, but is a limitation the law imposes upon the right to recover for the consequences of a negligent act." *Id.* There are multiple ways to determine whether the

defendant's alleged harmful conduct is the proximate cause of the plaintiff's injury. *CSX Transp., Inc. v. McBride,* 564 U.S. 685, 689 (2011). The district court cited to a negligence action brought against an employer under the Federal Employers Liability Act (FELA). *Id.* Under this act an employee may assert that the proximate cause is "[any] 'cause or [contribution] to' plaintiff's injury if defendant's negligence played a part—no matter how small—in bringing about the injury." *Id.* However, the proximate cause definition provided by the FELA is unique to negligence actions brought under the FELA. *Id.* Therefore, if an action is not brought under the FELA, then this "relaxed version" of proximate cause should not be applied. *Id.*

Instead, the "general" definition of proximate cause should be applied. *Robinson*, 24 S.W.3d at 77. Proximate cause is "any cause which, in natural or probable sequence, produced the injury complained of." Id. Therefore, the test for proximate cause "is … whether, after the occurrences, the injury appears to be the reasonable and probable consequence of the act or omission of the defendant." Id. If the proximate cause of the injury is contributory negligence, then the plaintiff is barred from recovery. *Rader v. David*, 207 S.W.2d 519, 523 (1948).

Contributory negligence "is a want of due care on the part of a plaintiff claiming to have been damaged by the actionable negligence of another, combining and concurring with that negligence, and contributing to the damage as a proximate cause thereof, without which such damage would not have occurred." *Id.* Reasonable and unreasonable assumption of the risk is "when a defendant owes a duty of care to the plaintiff but the plaintiff knowingly proceeds to encounter a known risk imposed by the defendant's breach of duty." *Sheppard by Wilson v. Midway R-1 School Dist.*, 904 S.W.2d 257, 263 (W.D. Mo. 1995).

If the assumption of the risk is reasonable then the plaintiff is not barred from recovery. *Id.* However, if the plaintiff knowingly encounters an unreasonable risk, then the plaintiff's conduct amounts to contributory negligence. *Id.* An assumption of the risk in the primary sense is when the plaintiff is aware of the risk inherent in the sport, but proceeds anyway. *Id.* This form of contributory negligence will bar the plaintiff from recovery. *Id.* An assumption of the risk in the secondary sense is when the plaintiff is aware of the risk created by the defendant's negligence, but assumes the risk anyway. *Id.* This form of contributory negligence will bar some of the plaintiff's recovery. *Id.*

In *Sheppard by Wilson v. Midway R-1 School Dist.*, the plaintiff was a long jumper and claimed that she sustained a knee injury in the course of competition because the defendant negligently prepared the long jump pit. *Id.* The court noted that the plaintiff's injury likely resulted exclusively from an awkward or bad landing which is an inherent risk of the sport. The court also noted that plaintiff's injury could have resulted from the assumption of risk created by the defendant's negligence under the secondary form of assumption of risk. *Id.*The court reasoned that because of the erroneous instruction to the jury, an inaccurate verdict would result form the jury's conclusion of either primary of secondary assumption of the risk. *Id.* Therefore, the court remanded the trial. *Id.*

The district court incorrectly interpreted the case *Sheppard by Wilson v. Midway R-1 School Dist.* Although Tulania did not have a duty to warn Ben Wyatt and did not breach any duty, we must assume these responsibilities for purposes of arguendo - to correctly analyze how Ben Wyatt assumed a primary risk. This case is similar to *Sheppard*; like the evidence in *Sheppard* that tends to show that the injury was a result of a risk inherent in the sport of long jumping, the evidence in the record tends to show that Ben Wyatt's injury was a result of an inherent risk assumed by a wide receiver competing in the sport of football. The inability to stop after a full sprint in a restricted area of a football stadium is an inherent risk that Ben Wyatt assumed and an inherent risk that both courts failed to thoroughly analyze. R. 17. According to the record, Ben Wyatt was out of control 10 feet behind the end zone. R. 17. Ben Wyatt, the "star wide receiver" with "agile feet" was most likely one of the few players who could have made the same catch and stopped safely within a distance of 10 feet. R. 17. However, one of the most athletic players on the field was not able to stop safely because the pass to the back-left corner of the end zone did not provide Ben Wyatt with enough space to stop safely. R. 17.

Ben Wyatt was one of the only players that could have stopped 10 feet beyond the end zone in the attempt of making the same catch. R. 17. Yet, Ben Wyatt was not able to do so and was still out of control when he reached the 10-foot mark. R. 17. If it weren't for the cone warning Ben Wyatt to slow down, Ben Wyatt could have sustained an injury much worse than the injury sustained by crashing into the walls of the stadium. R. 17. Therefore, Tulania is not liable because this was a primary assumption of the risk inherent to the sport of football and the cone prevented Ben Wyatt from sustaining a worse injury. Additionally, the district was not totally accurate in stating that, "[t]eams are not relieved from liability for every failure to exercise due care simply because of an inherent risk in the sport." R. 18. At the very least this case was a display of secondary assumption of the risk; like the plaintiff in *Sheppard* that assumed the risk created by the defendant's negligence, Ben Wyatt at the very least also assumed the risk created by Tulania's hypothetical negligence.

According to the Fourteenth Circuit, Ben Wyatt's attention was drawn to defective area of the field. R. 9. Ben Wyatt proceeded to play the whole game even though his attention was drawn to the defect. Thus, at the very least, Ben Wyatt assumed a secondary form of risk and should be relived of some liability. Therefore, Tulania's conduct was not the sole proximate cause of Ben Wyatt's injury. The Fourteenth Circuit's decision concluding that Ben Wyatt's injury was a result of Tulania's negligence should be reversed because the Tulania Sirens did not have a duty to warn Ben Wyatt, did not breach any duty owed to Ben Wyatt, and were not the proximate cause of his injury.

CONCLUSION AND PRAYER FOR RELIEF

For these reasons, the Petitioner requests that this Court reverse the Fourteenth Circuit's decisions in concluding that Section 12 is constitutional and that the topless mascot is obscene

material not protected by the First Amendment. The Petitioner specifically requests that this Court find that the Section 12 is unconstitutionally overboard and vague and that the topless mascot is not obscene according to the Miller test. The Petitioner also requests that this Court reverse the Fourteenth Circuit's decision concluding that the Petitioner is liable for negligence because the Petitioner did not have a duty to warn Ben Wyatt, did not breach any duty owed to Ben Wyatt, and were not the proximate cause of his injury.